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International Criminal Court. Steps towards a better
future against the fight against atrocities at a global
level**

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The various “faces” of the jurisdiction of the International Criminal Court. Steps towards a better future against the fight against atrocities at a global level

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Abstract: The present paper aims to investigate, from a theoretical point of view, the work of jurisdiction carried out after some years of work of the International Criminal Court (ICC). A jurisdiction of the ICC, that through delegation by the states, brings together the criminal jurisdiction. The states ratify the Rome Statute and transfer their prescriptive and/or judicial criminal jurisdiction to the ICC. This position means that the ICC can do what a state could not do. The limits and constraints of this type of jurisdiction are many and imposed in international law. The states confer and accept the jurisdiction of the courts. The ICC, therefore, does not transfer a set of power to those who need to do what cannot happen in national systems.

It is the same international law that encourages this path. For many courts, international tribunals of the UN as well as the theory of a collective conferral states also supports the same jurisprudence of the ICC especially in the matter of immunity that is in line with the principles of general international law. These together with the Statute of Rome and its own values have created what is today the court in a positive and/or negative way. It is still early to judge the draft of the court but we are sure that the steps forward towards the fight against atrocities have already been made.

Keywords: jurisdiction of the ICC; international criminal law; conferred jurisdiction; prescriptive jurisdiction; delegated jurisdiction; judicial jurisdiction; protection of human rights; crimes against humanity; war crimes; genocide; *ius puniendi*.

Introduction

Years have passed since the establishment of a permanent court to punish crimes against humanity and war crimes. The main question of discussion with many collateral aspects is whether in practice the International Criminal Court (ICC) really works? To arrive at a positive and/or negative answer, we must first focus on the functioning of the court. We refer to the concept of the jurisdiction of the ICC (Tsilonis, 2024).

A jurisdiction that is not only based on the delegation of a few states but also on criminal jurisdiction. The regime of the jurisdiction of the ICC includes in its framework a delegated (De Souza Dias, 2019),¹ transferred (Cormier, 2020)² and derived jurisdiction (Newton, 2016) coming from the general jurisdiction of the ICC (Van Schaack, 2018; Van Schaack, 2020).

These are different expressions and versions that are based on the preparatory acts and on how the ICC was organized, that is, on delegations of their states thus stating that the states have ratified the Rome Statute through a transfer and/or delegation of the criminal jurisdiction of a prescriptive and judicial nature of the ICC itself. This means that the ICC can do and can reach up to that point that the states could not do otherwise and that it cannot reach other paths other than those of punishing crimes against humanity and war crimes.

On the other hand, the argument relating to the interpretation of the Statute of the ICC (StICC) is considered as an imposed limit of international law. We note the case of Palestine that has not delegated the criminal jurisdiction of the ICC on crimes alleged

¹De Souza Dias: “(...) explanation for [the ICC’s] adjudicative powers (...) that these have been delegated or otherwise transferred by states or other subjects of international law (...)”

²Advisory Commission on Public International Law, Advisory Report No. 40, Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities 8 (2022).

on its territory by Israeli citizens since such crimes do not have jurisdiction for the court according to the Oslo agreements (Akande, 2019; Mudukuti, 2020; Heller, 2022).³

The relative regime governing immunity for heads of state at the ICC derives from anything that a state can delegate to the ICC thereby depriving the ICC of jurisdiction over heads of state unless the ICC has received a waiver of immunity from their country of origin.

This type of immunity is based on criminal proceedings by national jurisdictions without a waiver. This is the official position of the US even before the invasion of Ukraine from the Russian Federation. This was for the court a non-jurisdiction over citizens of non-party states. By party states at the StICC we mean those that cannot delegate jurisdiction to the ICC under treaties (Morris, 2001; Newton, 2016; Kay, Kern, 2019).

The theory of delegation by states on the jurisdiction of the ICC is descriptive. The term delegation for the delegated states is used as “*lex generalis*” and not as “*lex specialis*” (Sarooshi, 2005; Rastan, 2015).⁴ The legal limits are imposed by a theory

³Heller affirms that: “(...) Vladimir Putin would be immune from jurisdiction as a head of state if a specialized tribunal was created by an entity other than the U.N. Security Council (...)”.

⁴Sarooshi affirms that: “(...) “conferral of powers” and distinguishes “delegation” from “agency” and “transfer,” but notes that there is “a considerable lack of clarity and consistent usage in the conceptual labels used to describe different types of conferrals by states of powers on international organizations (...) ICC delegation theorists do not use the term “delegation” in the same way that Sarooshi does, to describe the kinds of powers conferred

of delegation that comes from the legal nature of the ICC in a general way.

The power of the court comes from the international tribunals. In a parallel way, exceptions are noted for supranational organizations at the European level such as the European Coal and Steel Community, the European Atomic Energy Community (EURATOM) and later the European Economic Community for states that transfer sovereign powers.⁵

States confer and accept the jurisdiction of international courts without transmitting to the main institutions a part of their sovereignty through ratification and/or accession by sovereign acts. In this way, the courts *super partes* do things that their own national legal systems cannot do. At this point international law encourages and allows its own jurisdiction at a supranational level.

The theory that confers the jurisdiction of the ICC considers the jurisdictional character of the international courts as well as the status of the ICC as an international institution. States have also established the International Court of Justice in a general way.

on the ICC by states (and its founding treaty) (...) use the concept as a prohibition under general international law that prevents the court from exercising its jurisdiction in certain cases (...)"

⁵Treaty Establishing the European Coal and Steel Community, 18 Apr. 1951, 261 U.N.T.S. 140; Treaty Establishing the European Atomic Energy Community, 25 Mar. 1957, 298 U.N.T.S. 167; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. See Treaty on European Union, 7 Feb. 1992, 1992 O.J. (C191).

They cannot settle disputes between sovereign states in national courts. They need an independent and neutral forum by creating an entity that submits disputes between them. States have also established courts for the protection of human rights, such as the European Court of Human Rights (ECtHR).

A court that does not delegate on the part of a national sovereignty and/or prescriptive jurisdiction but on rights that are enshrined in their own constitutions and/or national laws to international courts guaranteeing to their citizens the human rights that are enshrined in international law. Rights that states are required to respect at the ECtHR. They are enshrined in the European Convention of the Human Rights (ECHR),⁶ as rights present in national law and by the jurisdictions of national courts.

Similarly, Article 287 UNCLOS is taken into consideration which brings the dispute before the ITLOS, the ICJ and/or a special and hoc arbitral tribunal which may involve maritime cases which are not able to resolve the legal systems because they involve disputes between sovereigns.⁷

⁶The European Court of Human Rights (ECtHR) was established by the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, as amended by Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, C.E.T.S. No. 213 (entered into force 1st August 2021).

⁷United Nations Convention on the Law of the Sea, art. 287, 10 Dec. 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 396. The current docket of the ITLOS references thirty-two cases, none of which presumably could have

The establishment of the ICC as a super partes court of last resort examines cases involving the commission of international crimes which are established by the Statute of Rome as well as the elements of crimes when no state is able and willing to prosecute crimes which concern the international community as a whole and which involve the rights of states acting collectively for the protection of their own interests and of the international community as a whole (Akande, 2003).

In the past, the US sustained that the jurisdictional system of the ICC violated international law according to the jurisprudence of the ICJ as we have seen in the relevant opinions of the Lotus and Nuclear Weapons Advisory cases (Liakopoulos, 2020a).

The issue at stake was whether an international law allows the ICC to function (Scharf, 2001).⁸ The establishment of international courts are based on binding rules of international law. Their founding documents to exercise jurisdiction are conferred on their creators in a manner consistent with the statutes recognized by the ICJ in the case of reparations (Liakopoulos, 2020a).⁹

been resolved in a national court as they involve interstate disputes or requests for advisory opinions. See List of Cases, International Tribunal Law of the Sea, <https://www.itlos.org/en/main/cases/list-of-cases/> Accessed on 22.09.2025.

8ICJ, S.S. Lotus (France/Turkey) (The Lotus Case), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (7 Sept.); and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July)).

9Reparation for Injuries Suffered in Service of the United Nations (The Reparations Case), Advisory Opinion, 1949 I.C.J. 174, 182 (11 April): “(…)

Institutions such as the ICC (Stahn, 2016; Mègret, 2019) have international legal personality, are independent bodies and have jurisdiction that is contested by a party to the dispute based on the established principle of competence (Boisson de Chazournes, 2011).¹⁰

International courts unlike non-judicial bodies are created under international law by states that perform various tasks such as dispute resolution, compliance assessment, enforcement and legal advice.¹¹ When states have created a permanent court it means that they limit jurisdiction and decide according to the substantive law that the court applies and limits, or denies other implicit powers (Helfer, Slaughter, 2005; Shelton, 2009). They have powers in their hands by virtue of the status of judicial bodies (Shelton, 2017).

State control, also, exercised to overcome limits that maintain the judicial nature of their institution (Sarooshi, 1998). Like

WTO's Dispute Settlement Body is an exception, not because international law would not permit states to establish a free-standing and independent trade court, but because states declined to do so in crafting the treaty by which it was established (...)"

¹⁰Prosecutor v. Tadić (Tadić Interlocutory Appeal), Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, par. 18 (International Criminal Tribunal for the Former Yugoslavia, 2 October 1995).

¹¹Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Bangladesh Myanmar Jurisdiction Decision), ICC-RoC46(3)-01/18, Decision on the Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, par. 30 n. 38 (6 September 2018).

other international tribunals, the ICC is a “child” of international law with international legal personality. It is an independent international organization with a binding founding treaty that is interpreted as a *lex specialis* of international criminal law. A prescriptive, executive, jurisdictional jurisdiction for the ICC follows the principles of the Nuremberg tribunal also established and based on rules of international law (Shelton, 2017).

The challenges were many and continue in recent years and the ICC jurisdiction is the absolute protagonist in a number of situations that are committed by citizens of non-party states on the territory of a state party to the statute as well as on the territory of a non-party state referred to the Security Council (Liakopoulos, 2020e).

The jurisdiction is extended geographically in situations involving a commission of crimes partly in the territory of a non-party state as we have seen in the situation of Bangladesh/Myanmar.

The topic, issue of jurisdiction of citizens of non-party states and that of the territorial jurisdiction of the ICC are part of jurisdictional challenges in situations that are judged by the Chambers of the court and that have considered the exercise of its jurisdiction of the ICC in accordance with international law and the text of the StICC. It seems that a particular spirit of disagreement concerns the decisions made for jurisdiction as we

have seen in the cases of Afghanistan (Sadat, Carden, 2000; Sadat, 2002)¹² and Palestine (Wamsley, 2020; Berlin, 2020).¹³

The continued denial by the US to investigate the situation in Afghanistan recalls American arguments on the jurisdiction of courts in the 19th century (Brown, 1999; Martinez, 2008; Kontorovich, 2009).¹⁴

The former Sudanese president Omar Al-Bashir did not benefit from the immunity of the head of state before the ICC and the states parties were obliged to proceed with his arrest. The jurisprudence of the ICC and especially from the chambers has considered terms that are confusing.

The resolution of jurisdictional questions is not found in theories of derived, transferred, delegated jurisdiction but on a recognition that the jurisdiction of modern international courts situates the international legal order according to principles of

¹²See Rome Statute of the International Criminal Court art. 4(1), 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002).

¹³Wamsley affirmed that: “(...) The United States imposed sanctions on the ICC Prosecutor as well as one of her senior officials (...) the decision to open an investigation into the Afghanistan situation, which potentially implicated allegations of war crimes involving U.S. persons (...)”.

¹⁴Brown affirms that: “(...) U.S. objections to the ICC’s jurisdiction over non–States Parties have a “colonialist concept” and are “untenable” (...)”. Kontorovich affirms that: “(...) the United States refused to participate in international tribunals to punish slave trading in part due to objections about the jurisdiction of those courts over U.S. nationals (...)”. Martinez declared that: “(...) he first antislavery courts were established in 1817 and “were most active between 1819 and the mid-1840s (...) the United States was the last state to join the international anti-slavery courts, not joining until 1862, some 45 years after the first bilateral treaty had been signed (...)”.

international criminal law.

The *ius puniendi* of the international community respects fundamental crimes that fall within its jurisdiction (Ambos, 2013; Kress, 2022). A jurisdiction that does not derive and/or transfer from the national jurisdiction of any single state is represented as a collective form of attribution. The ICC has powers conferred by the states parties to the StICC inherent to the function of the ICC (Sarooshi, 1998).

The reasoning that has been adopted by the chambers of the ICC is an answer to the question of jurisdiction that is resolved according to the principles of general international law thus exercising prescriptive and executive jurisdiction to each situation in itself.¹⁵

The StICC is intended for the application of a situation in question. The jurisdiction of the ICC presents specific questions and in others it does not. The conceptions of legitimacy and the legality of international organizations in general arise from the *lex specialis* of international criminal law (Sarooshi, 2004).¹⁶

¹⁵Office of the Prosecutor, International Criminal Policy paper on case selection and prioritisation, par. 4 (2016): “(...) generally defined in terms of temporal, territorial and in some cases personal parameters (...) comprise specific incidents within a given “situation” during which one or more crimes within the jurisdiction of the court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the statute (...)”.

¹⁶Sarooshi affirms that: “(...) conferrals by states of powers on international organizations may undermine the separation of powers within states, a concern that national systems and the organization’s constituent treaty will need to address (...)”.

The product of practical and political constraints put the jurisdiction to create international courts and tribunals in order to address threats as we have seen in the Darfur, Rwanda and Myanmar cases. The invasion in Ukraine collectively confer to the ICC the judicial power over these situations. They do not delegate part of their sovereign authority because they are powerful to address their own calamities alone.

Jurisdiction and general principles of the StICC

The jurisdiction of the ICC is based on principles that were first expressed by the Nuremberg Military Tribunal (Schwarzenberger, Keeton, 1950; Simpson, 2008; Dittrich, Makraiovà, 2020),¹⁷ as well as by the ad hoc criminal tribunals, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda established by the Security Council.¹⁸ Better understanding the

¹⁷Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Schwarzenberger and Keeton declared that: “(...) legal standards (...) of the Tokyo Trial were such as to make lawyers wish to forget all about it at the earliest possible moment (...)”. Simpson affirmed that: “(...) the term “Tokyoberg” to refer to a transformative moment (...) the two great cities of Nuremberg and Tokyo (...) these two trials can be understood as a single event (...)”.

¹⁸U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, annex (3 May 1993), adopted by S.C. Res. 827, par. 2 (25 May 1993) (amended 1998, 2000, 2002, 2005, 2006, 2008, 2009, 2016). S.C. Res. 955, annex (8 Nov. 1994) (amended 1998, 2002, 2003, 2008, 2009).

jurisdictional quality of the ICC means contemplating the application of the StICC to new scenarios whenever we have crises, thus developing international criminal law towards new challenges and objectives.

The Nuremberg Tribunal and the ICC are established through an international agreement¹⁹ creating an official and direct response against atrocities. The US is accredited to establish a tribunal against the Russian Federation (Hirsch, 2020).²⁰

In fact, the Moscow Declaration of 30 October 1943²¹ is the first request for trials that establishes that part of the individuals are sent back to the countries where their actions were committed until the most serious crimes are judged and punished, crimes that do not have a geographical location but are punished with a joint decision by the allied governments.²²

Large and strong allies such as France, the Soviet Union, the US and the UK signed the London Agreement and Charter of 8 August 1945. Other nineteen countries followed this agreement.²³ During the months the tribunal tried twenty-two

¹⁹See preamble of the London Accord.

²⁰Hirsch affirmed that: “(...) the Soviets were influencing the Allied approach to German war crimes, they were continuing to engage in a massive cover-up of Katyn (...)”.

²¹Secret Protocol, annex 10, Nov. 1, 1943, 3 Bevans 816. See Resolution by Allied Governments Condemning German Terror and Demanding Retribution, 13 January 1942, 144 BSP 1072 (1952).

²²Moscow Declaration, op. cit., par. 836.

²³U.N. Secretary-General, The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, at 3, U.N. Doc. A/CN.4/5 (1949).

individuals, nineteen were convicted of three crimes, namely against peace, war crimes and against humanity as defined in its own charter (Sadat Wexler, 1996).²⁴ An international trial for atrocities and crimes committed in more serious form putting the leaders in the front line to be punished.

The trial of the Kaiser after the Treaty of Versailles²⁵ and the establishment of a special tribunal was a failure against William II of Hohenzollern (Schabas, 2018) as the Netherlands refused his extradition (Sadat Wexler, 1996).²⁶ The failure of Versailles paved the way for the establishment of an international criminal court for violating public order, as an independent institution of the ICJ.

The Second World War, state sovereignty and the absence of an international criminal code have created insurmountable obstacles for the formation of an international criminal court. After the atrocities of the Second World War, states have looked at the past differently and have continued to rely on past drafts and new legal theories and legal precepts for a new international criminal order (Burchard, 2003).

²⁴Judgment of 1 October 1946, in 22 Trial of the Major War Criminals Before the International Military Tribunal 411, 412, 529 (1948).

²⁵Treaty of Peace with Germany (Treaty of Versailles) art. 227, 28 June 1919, 42 Stat. 1939.

²⁶Sadat Wexler affirmed that: “(...) the establishment of an international penal jurisdiction would not prevent war, and might even make it worse, as justice could become an impediment to peace (...)”.

The Nuremberg Tribunal had a practical effect in this context. The Tribunal laid the foundation for the development of international criminal justice. It was the same judgment that stated that together we can do what we cannot do individually. This is how criminal jurisdiction is exercised.

The Moscow Declaration provided the reasoning that allows for the establishment of an international court to judge international crimes. The text mentions the international nature for crimes that have a geographical location (Randall, 1988; Joyner, Posteraro, 1999; Martinez, 2012; Chadwick, 2019; Mettraux, 2020).²⁷

These are crimes that include the notions of slavery, terrorism, piracy and have an impact on national borders. Universal jurisdiction over international crimes represents an official response mechanism to support the interests not only of the victors but also of the entire international community (Schwelb, 1946).

It was Nuremberg that established the crimes of international law, namely the prescriptive jurisdiction that provided for the determination and the modalities of execution as well as the judicial and executive jurisdiction. Nuremberg as an organ of the community of nations represents the supremacy of

²⁷Martinez affirmed that: “(...) use of the terms “crimes against humanity” and *hostis humanis generis* (enemies of all humankind) by nineteenth-century writers on the slave trade (...)”.

international law over national law (Schwelb, 1946).

Act No. 10 of the Control Council²⁸ concluded that the tribunal is an international judicial body that exercises its jurisdiction for the international community, representing thus the effects of the UN (Schwelb, 1946).²⁹ In this spirit, Pella observed that:

“(...) several jurisdictional powers, the states concerned inevitably set up a superior judicial order (...) possessed powers over each of the states setting it up (...) decisions were taken by majority vote (...) state whose judge dissented was bound to recognize the validity of its decisions (...)” (Pella, 1950).

We can understand that the court of Nuremberg is of real international inspiration (Pella, 1950). It was not a new idea but an effective implementation that Nuremberg was a novelty for the time (Pella, 1928).³⁰

For scholars of the time (Donnedieu de Vabres, 1924; Bellot, 1926; Aronèanu, 1946; Graven, 1950) the Nuremberg court was important because it responded to an international order of international criminal law. It laid the foundation for the establishment of the ICC (Sadat, 2010). These were ideas from

²⁸Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Official Gazette of the Control Council for Germany, 50 (1945).

²⁹Schwelb affirmed that: “(...) The Israeli Supreme Court took the same position in the Eichmann decision. CrimA 336/61 Attorney General of Israel v. Eichmann, 16 PD 2033 (1962) (Israel) (...) the establishment of the IMT was not just “an act of legislation” but “the expression of international law existing at the time of its creation (...)”.

³⁰See Report of the Permanent International Criminal Court Committee, 1927.

the past that had found a positive basis for many years in the UK and in the US (Hudson, 1938; Sadat, 2010).³¹

After the creation of the UN, the inspiration for an ambitious plan to establish a permanent international criminal court was based on Art. VI of the Convention on Genocide of 1948 (Scalia, 2020), which referred to a future international criminal court.³² A court that was based on the Nuremberg Principles according to the elaboration of the International Law Commission of 1950.

The principles, that affirmed in the international community the right to create a question of prescriptive jurisdiction for international crimes, had to do with a court to judge cases that respected such law against individuals. Defendants of various crimes could not invoke national law to defend themselves but a right to a fair and just trial based on facts and law.³³

The Nuremberg Principles represented customary international law (Whiteman, 1977; Cherif Bassiouni, 1996; Orakhelashvili, 2006; Cassese, 2008; Kress, 2009; Paust, Cherif Bassiouni, Scharf, Sadat, Gurulè, Zagaris, 2013; Donat Cattin, 2017;

³¹Hudson affirmed that: “(...) European scholarship as revealing “the spell which the idea of an international criminal court exercised on many minds” (...)”.

³²Convention on the Prevention and Punishment of the Crime of Genocide art. 6, 9 December 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

³³Report of the International Law Commission Covering Its Second Session, 5 U.N. GAOR Supp. No. 12, princ. II, V, at 11, 12, U.N. Doc. A/1316 (1950).

Werle, Jessberger, 2020). In a unanimous decision (Schabas, 2016)³⁴ the Appeal Chamber of the ICC took a position in the Al-Bashir case admitting that there is no rule of customary international law that grants Al-Bashir the relative immunity requested after his arrest and surrender before an international court such as the ICC.³⁵ This is a direct application to fundamental crimes of *jus cogens* in international criminal law that are in conflict with an indirect application to international crimes originating from national systems (Cherif Bassiouni, 2003; Liakopoulos, 2020d).

The project was the establishment of an international criminal court, as a response to the end of the Cold War (Sadat Wexler, 1996). The International Law Commission continued to work on the draft of the crime code (Goldsmith, 2003; Higgins, 2004; Linton, Kebede, 2009),³⁶ as well as on the creation of an international criminal organ, as a response against atrocities committed for crimes that are committed and punished in ICTY

³⁴Schabas affirmed that: “(...) (prior to the Al-Bashir decision), that “under no circumstances can a State Party referral or the Prosecutor acting *proprio motu* remove the immunity of a head of state of a non state party (...) view is that the “challenge [immunity] poses for the integrity of the system is sometimes exaggerated (...)”.

³⁵Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment, parr. 116–117 (6 May 2019).

³⁶See: Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (13 April 2006), as corrected by U.N. Doc. A/CN.4/L.682/Corr.1 (11 August 2006).

and in ICTR. It was the Security Council that entrusted itself with its enforcement powers, according to Chapter VII of the Charter of the UN by negotiating its own treaty (Morris, Scharf, 1995; Cherif Bassiouni, 1996; Liakopoulos, 2020e).³⁷

The jurisdiction of the ICTY in 1995 through the Appeal Chamber issued a very important decision in the Tadić case regarding its jurisdiction and authority. The Appeal Chamber highlighted the creation of a tribunal that.³⁸ It involved the creation of an autonomous judicial body within a general super partes judicial system. The Appeal Chamber stated, in this regard that:

“(...) every tribunal is a self-contained system (unless otherwise provided) (...) constitutive instrument of an international tribunal can limit some of its jurisdictional powers (...) such limitation does not jeopardize its “judicial character” (...)”.³⁹

As can be seen, these are not presumed but precise limits that cannot influence the very concept of jurisdiction (Fan, 2012). The most accepted vision was that of a broader independence and autonomy of international criminal law that goes beyond the logic of the past and is based on new realities such as those we

³⁷U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), par. 31-68, U.N. Doc. S/25704 (3 May 1993).

³⁸Tadić Interlocutory Appeal, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, par. 38 (International Criminal Tribunal for the Former Yugoslavia, 2 October 1995).

³⁹Tadić Interlocutory Appeal, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, par. 11.

have seen after the Tadić case (Alvarez, 1996; Swart, 2011).⁴⁰ This is a landmark ruling with much criticism and skepticism (Alter, 2008; Alter, 2013)⁴¹ as the ICTY was not consistent with an intrinsic jurisdiction under the rules based on international courts. It was consistent with a general conceptualization of international courts that relied on the law as opposed to state agents assuming authority and defining their own law (Martinez, 2000; Helfer, Slaughter, 2005; Linton, Tiba, 2009; Alter, 2013). This is a task given by states seeking international adjudication of a dispute. Within the context of the ICC, judges and prosecutors were based on a professional and/or personal reputation that made decisions expected as a correct outcome of their case according to their law (Alter, 2013).

The relative position on the Tadić case was oriented towards this position. International courts could exercise the powers and procedures expressed implicitly. The respective member states did not have their own independent regulation and the

⁴⁰Tadić Interlocutory Appeal, Case No. IT-94-1-AR72, Separate Opinion of judge Li, par. 3: “(...) judgment was examining the competence and appropriateness of the Security Council resolution establishing the Tribunal, a task he thought was outside its purview given that the Appeals Chamber’s judges were “trained only in law and having little or no experience in international political affairs (...)”.

⁴¹Alter affirmed that: “(...) “self-binding” elements underscoring Alter’s trustee concept can be seen in the Prosecutor’s *proprio motu* powers (Arts. 13(c), 15(1)) (...) the ICC review of admissibility determinations which give the Court the last word in a contest over complementarity or admissibility under *ne bis in idem* (...)”.

competences of courts and/or tribunals were having difficulty functioning properly. The Tadić case consider competence as a fundamental principle of international adjudication for *ad hoc* courts, i.e. subsidiary bodies of international organizations.⁴²

The tribunals deal with disputes regarding jurisdiction. They accept appeals filed as well as reject other disputes that jurisdiction called into question (Shelton, 2017).

The ICTY and ICTR were largely based on the Nuremberg model. As a principle governed by primacy that national courts referred requested cases (Stahn, Agius, Brammertz, Rohan, 2020).⁴³ In the ICTY the relevant appearance was the result of a referral request from the government of the Federal Republic of Germany.⁴⁴

The ICTY and ICTR were actually similar to the ICC with regard to the jurisdictional configuration. Prescriptive criminal law incorporated its own statutes. They were superior to national law in the case of crimes that were foreseen by the charter of the Nuremberg. In such a case, the *ad hoc* courts had jurisdiction of an executive nature that could replace the drafting and work of the national courts.

⁴²Tadić Interlocutory Appeal, Case No. IT-94-1-AR72, Decision on the Defense Motion, par. 18.

⁴³Art. 9, par. 1 ICTY Statute.

⁴⁴Tadić Interlocutory Appeal, Case No. IT-94-1-AR72, Decision on the Defense Motion, par. 50.

What did the Rome statute consensus offer?

During the negotiation of the StICC and after the inclusion of the Nuremberg consensus, which was at the heart and mind of the negotiation, the ICC operated in a prospective and not retroactive manner to reflect on national jurisdictions.

The International Law Commission (ILC) had been commissioned by the General Assembly to prepare a draft statute for the court. It was the draft of 1994 which included jurisdiction respecting the crime of genocide including also aggression, war crimes, crimes against humanity and treaty crimes. It was created by the inspiration of special conventions concerning international criminal law.⁴⁵ It was based on a complex opt-in system. The draft of the ILC allowed only the states parties as well as the Security Council to send complaints to the court.

After the discussion of the relevant *ad hoc* committee on the draft of the ILC, disagreements arose regarding the jurisdiction of a future court.

States argued that inherent jurisdiction over basic and minor crimes was for the court a guardian of international public order.⁴⁶

⁴⁵Report of the International Law Commission on the Work of Its Forty-Sixth Session, 49 U.N. GAOR Supp. No. 10, at 38-42, U.N. Doc. A/49/10 (1 Sept. 1994): “(...) listing crimes within the jurisdiction of the court (art. 20) and preconditions to the exercise of jurisdiction (art. 21)) (...)”.

⁴⁶Report of the *Ad Hoc* Comm. on the Establishment of an International

A more restrictive approach included the requirement of consent for the nationality status of one's accused (Wilmschurst, 1999). The text did not follow, therefore, this approach.

The preparatory committee of the UN was tasked with preparing a diplomatic conference thus highlighting the orientation trends based on disagreement and details in versions of a text on jurisdiction and activation mechanisms even before the opening of the diplomatic conference which contained various other options.⁴⁷

The consent of conventional crimes were eliminated and not concluded in the statute. The delegations arrived at an opt-in system proposed by the ILC thus abandoning the regime that made the jurisdiction of the court automatic. States ratify their own statute as subject to definable preconditions.⁴⁸ According

Criminal Court, 50 U.N. GAOR Supp. No. 22, par. 93, U.N. Doc. A/50/22 (6 September 1995).

⁴⁷See the Report by the Working Group on Complementarity and Trigger Mechanisms contained a series of complex options on jurisdiction reflecting a variety of views expressed by states. Preparatory Commission on the Establishment of an International Criminal Court, Report of the Working Group on Complementarity & Trigger Mechanism, U.N. Doc. A/AC.249/1997/L.8/Rev.1, annex I (14 August 1997).

⁴⁸U.N. Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Official Records, 6th plen. Meeting, at 97-105, U.N. Doc. A/CONF.183/13 (Vol. II), U.N. Sales No. E.02.I.5 (2002), par. 69, 77, 96: "(...) The transcript of this early plenary session included comments by several delegations supporting "inherent jurisdiction" (with no opt-in or opt-out) over the crimes of genocide, war crimes, and crimes against humanity including Argentina, Belgium, Ireland, Finland, the Netherlands, New Zealand, and Luxembourg (...) arguing that the court must have "universal jurisdiction". France agreed, although it expressed some concern regarding war crimes (...) Israel supported jurisdiction over the three crimes

to the proposal of Germany universal jurisdiction over core crimes related to genocide, crimes against humanity and war crimes should have the authority to try anyone who is on the territory of a state party even if the crime was committed elsewhere and the accused was not a citizen of the state party. It was a broad proposal accepted by many states (Benedetti, Bonneau, Washburn, 2014; Schabas, 2016).

The Republic of Korea presented a proposal based on the automatic jurisdiction of the court requiring at least one of the four possible states to be bound by the jurisdiction. That is, the territorial state, the states of the nationality of the accused, the victim and/or the state of custody that the accused is in. A proposal that caused concerns on some states. Many objections from various states arose. They argued that universal jurisdiction did not encourage their own ratifications. The US considered this idea as an obstacle to the ratification of the statute (Schabas, 2016).

The jurisdictional regime of the ICC was decided only in the last days of the negotiations. Already in July 1998 a proposal for

but expressed concern about political abuse of the process (...) United Kingdom proposed that states would automatically accept the jurisdiction of the Court by ratifying the statute, but that the consent of the custodial state and the territorial state would be required as regards non-party state nationals. Preparatory Commission on the Establishment of an International Criminal Court, Proposal by the United Kingdom of Great Britain and Northern Ireland: Trigger Mechanism, U.N. Doc. A/AC.249/1998/WG.3/DP.1 (25 March 1998).

restrictive jurisdiction chose to submit the conference to two options. The first one provided for automatic jurisdiction over all three fundamental crimes. A second path provided for automatic jurisdiction over genocide which required accession to the jurisdiction of the court over crimes against humanity and war crimes.⁴⁹

The US presented a proposal based on the consent of the state of nationality of the accused considering the territorial status as a precondition for jurisdiction.⁵⁰

Another line of thought, regarding the limitation of the jurisdiction of the Court, was proposed by the states that wanted to exclude themselves from the provisions of the statute on crimes against humanity for a period of ten years and from the provisions on war crimes for three years.

The relative exercise of jurisdiction over nationals of non-party states accused of war crimes and crimes against humanity amounted to official acts thus requiring recognition of one's act and the consent of the state of nationality of the accused of one's jurisdiction (Kirsch, Holmes, 1999; Wilmschurst, 1999).

⁴⁹U.N. Diplomatic Conference, op. cit., Bureau: Proposal Regarding Part 2, at 217, U.N. Doc. A/CONF.183/13 (Vol. III).

⁵⁰U.N. Diplomatic Conference, 42nd mtg. of the Commission of the Whole, parr. 20-23: "(...) United States of America: Proposal Regarding Article 7, at 247, U.N. Doc. A/CONF.183/13 (Vol. III). United States of America: Proposal Regarding Article 7 ter, par. 249.

The idea of exclusion received positive attention and the final text provided for a seven-year exclusion on war crimes (Motzfeldt Kravik, 2016),⁵¹ as an idea of an immunity action for some states including the US which sought to restrict the jurisdiction of the ICC.

India wanted to expand its independence from the ICC by eliminating the role of the Security Council from the statute.⁵² The positions of India and US were accepted as motions of non-intervention in the diplomatic conference⁵³ which adopted the final text with a vote of 120 in favour and 7 against including the US and 21 abstentions (Benedetti, Bonneau, Washburn, 2014).⁵⁴

A solution was adopted by the conference. In terms of prescriptive jurisdiction the jurisdiction of the court was universal applicable to every human being without geographical,

⁵¹Art. 124 StICC. U.N. Secretary-General, Statement on Amendment 124 of the Rome Statute of the International Criminal Court, U.N. Ref. C.N.7.2016.TREATIES-XVIII.10 (Depositary Notification) (15 January 2016).

⁵²U.N. Diplomatic Conference, op. cit., 42nd mtg. of the Comm. of the Whole, par. 8, at 360: “(...) India: Proposed Amendments to the Draft Statute in Document A/CONF.183/C.1/L.76/Add.2 and Corr.1, at 250, U.N. Doc. A/CONF.183/13 (Vol. III) (...)”.

⁵³U.N. Diplomatic Conference, op. cit., 42nd mtg. of the Comm. of the Whole, par. 9–15, at 360-361: “(...) no-action vote on India’s proposals), par. 4-31, at 361-362.

⁵⁴Benedetti, Bonneau, Washburn declared that: “(...) vote was unrecorded (...) dissenting votes are generally attributed to China, Iraq, Israel, Libya, Qatar, and Yemen, id., although recent evidence suggests that Syria may have voted “no,” rather than Libya (...)”.

national limits even if it was contrary to the Security Council (Dinstein, 1998; Sadat, Carden, 2000; Kress, 2009; Schabas, 2009; Werle, Jessberger, 2020).⁵⁵ It was an international jurisdiction distinct from the universal one in interstate cases (White, Abass, 2024).⁵⁶

⁵⁵Werle, Jessberger affirmed that: “(...) ‘Rome law’ is customary international law, otherwise it is problematic to have the Security Council apply Rome law to the nationals of non states parties, and for immunities (...) Articles 6, 7, and 8 of the Rome Statute represent customary international law because they crystallized, codified, or created it at the time of the statute’s negotiation (...)”. According to Kress: “(...) This view was recently expressed by the Court. See Prosecutor v. Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/20 OA8, Judgment on the Appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defense “Exception d’incompétence””, par. 89 (1 November 2021): “(...) statutory crimes are a product of a concerted effort to codify the developing state of international law (...) the crimes under the statute were intended to be generally representative of the state of customary international law when the statute was drafted (...) nature of Rome Statute crimes is what renders ICC’s universal prescriptive jurisdiction legitimate (...)”.

⁵⁶Szasz affirmed that: “(...) accepted that intergovernmental organizations (IGOs) cannot legislate international law. Exceptionally, a few IGOs are empowered to adopt international legal rules that could become binding on their members, but these states could opt out by raising a timely objection (...) the substantive rules of the Rome Statute must be grounded in customary international law, given that the Security Council may refer situations involving non states parties and their nationals to the Court. The Council cannot “create” rules of international law (...)”. Prosecutor v. Al-Bashir, ICC-02/05-01/09, Minority Opinion of Judge de Brichambaut, par. 61 (6 July 2017): “(...) powers of the UN Security Council to set aside customary international law ‘the prevailing opinion [is] that Article 103 should be read extensively-so as to affirm that charter obligations prevail also over United Nations Member states’ customary law obligations (...)” ILC Fragmentation Report, op. cit., par. 345)). The ILC Study Group admits that the Security Council cannot contravene a *jus cogens* norm. ILC Fragmentation Report, op. cit., par. 346 (...) broad assertion that it can set aside customary international law or create new rules of international law is

The jurisdiction of the ICC and the referrals by the states or the prosecutor is overlapped by jurisdictional prerequisites that are provided by Art. 12 StICC to a prescriptive universality, thus limiting the adjudicate jurisdiction of the court for crimes committed on the territory of the states party to the statute and by their own citizens (Ambos, 2022).

The principle of complementarity has been imposed by the ICC to waive jurisdiction when a state not party to the statute investigates and prosecutes a case under examination. Every connection with the state of custody has been removed. The exercise of the decision, as a power of the court under the work of an independent prosecutor, has been limited (Ambos, 2022).

Art. 15 StICC provides that the prosecutor cannot open an investigation without the relevant permission of a preliminary chamber. So we can speak for a restricted adjudicatory and confirmative jurisdiction, executive from the court according to the treaty of ICC. Furthermore, the exercised jurisdiction for ad hoc courts was become less extensive.

The executive jurisdiction of the court is weak according to the components of its power. So it is allowed that state borders are willing to offer and respect a right that goes above and beyond

virtually unfooted and seems at odds with current understandings of the limits of the Council's powers. White, Abass affirmed that: "(...) Article 103 gives obligations arising out of the UN Charter pre-eminence over obligations arising under any other international treaty, though it is not clear that this affects member states' customary duties (...)".

the period of the Cold War.

Applicable jurisdiction and principles relating to international courts

Theories of delegation outside the *lex specialis* of the ICC concern the jurisdiction of international courts that are within the context of the ICC but not to the same extent. The jurisdiction of the ICJ and the European Court of Human Rights (ECtHR) are discussed in the same terms with the ICC. Delegation for the terms of jurisdiction is linked with the authority of the court thus using in a narrow way the theory of delegation of the ICC.

International courts exercise the form of delegation power (Bradley, Kelley, 2008) in a concentrated and rigorous manner on the delegation of jurisdiction. Thus, delegation presents itself as a concession of authority by two or more states to an international body to make decisions and undertake its own actions.

The definition and affirmation of the nature of its power is noted in the ECtHR, thus exercising an extraterritorial jurisdiction that does not generate and does not ask outside the delegated jurisdiction of the court other questions of interpretation. It is asked if outside the delegated jurisdiction of the court questions of interpretation arise relating to the scope of application of the

European Convention of Human Rights (ECHR).

Extraterritoriality has been admitted in various circumstances and is exercised as a form of control over a territory outside the state (Villiger, 2023).⁵⁷ This approach is noted in national courts that do not have jurisdiction over actions external to their territory. For international courts such as the ICJ, the authority of states themselves is precise and not transferred from national jurisdictions since states do not exercise such authority. The ICJ monitors and examines questions of international law as the ICC examines the commission of international crimes (Liakopoulos, 2020a).

The International Tribunal for the Law of the Sea (ITLOS) has exercised jurisdiction over disputes that use the interpretation and application of the UNCLOS, as well as disputes and requests submitted under the provisions of agreements that confer its jurisdiction. The ICJ deals with disputes that involve states. In the event of a dispute, the jurisdiction of the Tribunal has jurisdiction to decide on the relevant dispute.

National courts do not have jurisdiction to hear cases before the ITLOS due to limitations that exist as well as the horizontal application in international law by sovereigns in an equal manner.

⁵⁷ECtHR, *Loizidou v. Turkey*, App. No. 15318/89, 18 December 1996; *Al-Skeini v. United Kingdom*, App. No. 55721/07, 7 July 2011.

Very interesting, in this spirit, seems the reference of the jurisdiction of the Court of Justice of the European Union in the sector of preliminary references in the Court, as happens in the ICC that exercises jurisdiction over citizens of non-party states. But this does not demonstrate that Member States of the Union have delegated a criminal jurisdiction to the CJEU. In fact, an independent jurisdiction is exercised that is transferred, conferred by Member States to assess the compatibility of their criminal law with the law of the Union in specific cases.

The ICC as an international organization

The ICC enjoys and is endowed with international legal personality according to Art. 4, par. 1 of the StICC (Ambos, 2022).⁵⁸ The ICC is not deprived of the status of an international organization that satisfies its own criteria, i.e. one created by a treaty. It has an autonomous and distinct will from its members (Rückert, 2016; Schmalenbach, 2020).

Art. 4, par. 1 is a useful indication that conceives at the ICC legal powers of states exercised at an international level establishing thus legitimate objectives (Lüder, 2002).

In preamble, the objective of the StICC is to establish an ICC with the ultimate goal of putting an end to impunity and to

⁵⁸See Art. 4, par. 1 and 2 StICC: “(...) exercise its functions and powers (...) the territory of any State Party (...) agreement, on the territory of” other states (...)”.

atrocities that have profoundly shocked the conscience of humanity, that contributes to the prevention of crimes for an international community as a whole. It is worth recalling the case from the ICJ in the reparations case⁵⁹ when it was asked for the UN international legal personality as:

“(...) presence for specific tasks, obligations of member states to accept decisions taken by such bodies (...) granting of privileges and immunities (...) conclusion of agreements between the UN and the member states (...)”, as a detached evidence from its members of the UN (White, 2017). Thus the ICJ stated that:

“(...) its members by entrusting certain functions with duties of responsibility (...) conferred the necessary competence to allow such functions to be effectively carried out (...)” (Liakopoulos, 2019b; Liakopoulos, 2019c).⁶⁰

The StICC has defined the relationship of the ICC with the United Nations and with other international organizations. It is a mechanism for state parties to exercise oversight of the institution. It proposes and amends the treaty to include criminal legislation within the StICC, as established by the treaty. Particularly, the StICC has established the ICC as an autonomous international organization (Klabbers, 2017) which has acquired international legal personality according to art. 4, par. 1.

⁵⁹ICJ, Opinion on Reparation of Damage for the United Nations of 11 April 1949, ICJ Reports, 1949, par. 174ss.

⁶⁰ICJ, Opinion on Reparation of Damage for the United Nations of 11 April 1949, op. cit., par. 179.

Judges and prosecutors are independent in their exercise of their functions and carry out their duties without favour or fear. Thus, it is an international organization with rich elements of supranationality unlike the CJEU whose judgments have direct effect in national legal systems. They operate in a direct manner to individuals who are accused of crimes of the ICC.

The principle of complementarity requires the ICC to defer to national systems and to investigate a defendant sought by the ICC. The ICC and not the state has the final say on the renunciation of its jurisdiction.⁶¹

The objections of states regarding the lack of immunity to Al-Bashir and the jurisdiction of the ICC over nationals of non-party states accused of committing crimes in their territories for the states parties seem to consider the ICC as a regime of international criminal law in a general way and as a structure that the states parties to the StICC use under their own control (Guilfoyle, 2019).⁶²

⁶¹Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine, International Criminal Court (3 March 2021), <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine> Accessed on 22.09.2025.

⁶²Guilfoyle affirmed that: “(...) lines when he reverted to the pre-Rome ILC idea of making the court’s judiciary temporary and shifting its focus to serving as a “mechanism for assisting the creation of special chambers in national legal systems with international elements (...) a small standing court attached (...)”.

Such was the position of the ILC which obliged the members to ascertain the organization as an international person, competent to carry out acts that according to traditional international law are carried out by their own states (Liakopoulos, 2020b).⁶³

The autonomous will of the ICC has demonstrated the granting of legal personality based on art. 4 (Helfer, Slaughter, 2005; Schermers, Blokker, 2018).

The court and not the states parties decided whether there is jurisdiction and admissibility to confer on the institution and to create rules for its functioning in relation to the judiciary (Schmalenbach, 2020) and the office of the prosecutor. The ICC like other international organizations is bound by its members, the states parties to the StICC.

The periodic elections of the staff of the ICC, through the budgetary procedure of the assembly of states parties and the annual review and the ICC, is subject to limitations on jurisdiction and admissibility as well as to political and external constraints.⁶⁴

The ICC depends on the cooperation of states (Liakopoulos, 2019d; Liakopoulos, 2019e) to conduct its investigations and follow up criminal proceedings.

⁶³ILC 1994 Draft Statute, op. cit.

⁶⁴Assembly of States Parties, International Criminal Court, Procedure for the Nomination and Election of Judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: Consolidated Version, ICC-ASP/8/Res.1 (10 September 2004).

The acquittal rate for crimes in the early years of its operation was very high compared to other international criminal courts (Goldstone, 2019; Cryer, Robinson, Vasiliev, 2019; Robinson, Vasiliev, Van Sliedregt, Oosterveld, 2024) despite the fact that the principle of complementarity worked effectively⁶⁵ without emerging to other criminal proceedings that were politically motivated. International organizations behaved differently than expected and this affected the system by damaging the interests of states that offered evidence to the ICC (Guzman, 2013).

Delegation theory at the ICC

Delegation theory and transfer of national jurisdictions of the ICC are grouped together to facilitate understanding of some categories, according to the proposal of the US during the Rome conference. The conference focused on treaty law as a different version that rejected the treaty law argument. It accepted the transfer thesis for powers that concerned the decision-making jurisdiction of the ICC.

The extension of the emergency theory in relation to situations that are referred to the ICC, including Afghanistan and Palestine, suggested limits to the decision-making activity of the ICC (Liakopoulos, 2022). It was rejected by the states parties of

⁶⁵Office of the Prosecutor, International Criminal Court, Situation in Iraq/UK: Final REPORT (2020): “(...) to close the preliminary examination of alleged UK war crimes in Iraq on the basis of complementarity (...)”.

the ICC the delegation theory that was formulated as a political and less legal argument in most fora.

The nature and effects of the jurisdiction of the ICC were argued by the US through the conference that it violated treaty law as the ICC exercised its jurisdiction over nationals non-parties without the consent of the state of nationality of their suspect/defendant (Wedgwood, 1998; Scheffer, 1999). This position was denied by the Canadian president in the diplomatic conference during the negotiation as:

“(...) not bind states that are not parties to the Statute (...) the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations (...)” (Kirsch, 1998).

This position was also rejected by other states that were involved in the negotiations (Hafner, Boon, 1999; Arsanjani, 1999; Danilenko, 2000; Scharf, 2001; Kirsh, 2001)⁶⁶ who did not agree with the view of the US arguing that such an argument was opposed to the Kaiser's trial after the First World War as well as not supported during the consensus of the Nuremberg trial.

Crimes in the StICC were of universal jurisdiction. In this regard, a state should

⁶⁶Arsanjani affirmed that: “(...) majority of states (...) could not agree to requiring the consent of the state of the nationality of the accused as a prerequisite for the court's jurisdiction (...)”.

“(...) agree with an-other state or group of states to set up a tribunal (...) render to such a tribunal any person reasonably accused of a crime under customary international law who is found in territory under its control (...)” (Paust, 2000).

The ICC exercised jurisdiction over state officials and in some cases over their actions that violated treaty law without the consent of the state of their nationality. The ICC dealt with the resolution of interstate disputes by requiring the consent of both states and rejecting the ability for states to delegate universal jurisdiction. The violation of treaty law and the ICC asserts its jurisdiction over American persons who were accused of crimes in Afghanistan (Petrossian, 2023; Liakopoulos, 2023) because the US did not consent to the jurisdiction of the ICC and negotiated the agreements on the status of forces (SOFA) and the assignment of jurisdiction over American forces. Positions that affirmed force by snubbing the theory of delegation. The American diplomat David Scheffer wrote at the time:

“(...) grounded in the Vienna Convention on the Law of Treaties, on behalf of the U.S. Government many years ago (...) little credibility because of the character of the crimes at issue, the evolution of international criminal law, and the longstanding principle of criminal jurisdiction over one’s own territory (...)” (Scheffer, 2020).

Dapo Akande also stated that:

“(...) it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states [under universal jurisdiction] (...) states from acting collectively in the

prosecution of these crimes (...)” (Akanke, 2019).

The US have supported the jurisdiction of the ICTY and of the Special Tribunal for Sierra Leone by exercising jurisdiction over individuals (Liakopoulos, 2019f; Chernor Jalloh, 2020).⁶⁷ The US have argued that the jurisdiction of the ICC in situations such as that of Ukraine (Hill, 2022) implies the prosecution of Russian citizens who are not parties to the StICC, accusing them of having committed crimes on their Ukrainian territory (Goodman, 2022). It is concluded that the original theory, that was employed by the US, was advanced by the doctrine and perceived as a political objection relating to the jurisdiction of the ICC as a legal constraint.

The term delegation was based not on a shared jurisdiction but on states that jointly and individually make an effective transfer of criminal jurisdiction to the StICC. The ICC exercises jurisdiction over nationals of states not parties, thus imposing further limitations.

The ICC thus exercises delegated powers that come from its own states in a limited way within the exercise of its jurisdiction by limits provided for by national law. This position of the US was based on the negotiation of bilateral agreements of

⁶⁷Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, par. 52 (31 May 2004); Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, par. 27-28 (International Criminal Tribunal for the Former Yugoslavia 8 November 2001).

humanity (Akande, 2004).

Heads of state, according to Art. 98, par. 1 StICCC, operate in obstacle to the application of art. 27, par. 2 (Gaeta, 2009; Cormier, 2020; Ambos, 2022).⁶⁸ The criminal prosecution of individuals entitled to personal immunity before international courts and the state of nationality have not consented the criminal prosecution. The ICC has no jurisdiction over Russian leaders as long as Russia remains a non-party.

In our opinion the StICC is a jurisdictional instrument in accordance with the aspirations of the ILC. It embraces the idea of delegation in a strict sense also describing its powers (Liakopoulos, 2020b). This position rejected the work that bases the nature of the jurisdiction of the ICC on previous tribunals such as the *ad hoc* tribunals and the Nuremberg Tribunal ignoring the distinction between national and international jurisdictions. We cannot believe that states parties have agreed to waive the immunities of their officials before the ICC and a domestic jurisdiction of other states parties in a horizontal manner.

States create international judicial bodies to do things they cannot, want to do alone. The global nature of the ICC includes

⁶⁸Gaeta affirmed that: “(...) ‘ICC arrest warrant is a lawful coercive act against an incumbent head of state,’ because Sudan has not waived the immunities of Al-Bashir, ‘states parties to the statute are not obliged to execute the ICC request for surrender of President Al Bashir, and can lawfully decide not to comply with it (...)’”.

in an unrestricted manner the members participating in the ICC. This means that it is not the judges of one state who judge the citizens of another state but a global institution of worldwide competence.

Such a practice has established that the ability of states to create institutions confers the authority to adjudicate criminal and civil cases. They do not transfer part of their authority but establish international institutions whose power and authorities are defined in international law and in the founding treaties.

The delegation theory extends its concept to high-ranking officials of non-party states, who cannot be prosecuted by domestic courts. It is recalled within this position that Palestine, independently of its state status, does not delegate the authority of the ICC for charges of crimes that are committed by Israeli citizens in its territory, despite having ceded its jurisdiction on what was affirmed and negotiated in the Oslo agreements.

This is a version of the delegation theory that implies that the jurisdiction of the court defers from that of the Security Council to examine the domestic legislation of the territorial state as well as the nationality status of the accused and of all states with jurisdiction outside the limits imposed by treaties, such as the Oslo agreements on internal security SOFA's.

A result that has reduced the ICC as a jurisdictional instrument contrary to those who negotiated its text. The principle of

complementarity limits the exercise of jurisdiction for the ICC only to cases that states are unwilling and unable to do so.

A theory that suggests that there is no jurisdiction over crimes against humanity committed by Russian citizens in Ukraine since the latter does not have legislation on crimes against humanity. For many states the StICC does not have universal jurisdiction legislation. This means that it cannot exercise jurisdiction over crimes. The ICC should consult the national legislation of each territorial state since the state carries its nationality for the accused. The Palestinian situation is distinct and accepts the objectives of joining the StICC. A state party as the Trial Chamber III has established that the jurisdiction of the ICC does not depend on the treatment of crimes by national legislation.

Lastly, the Nuremberg Tribunal the delegation theory denied the jurisdiction of that tribunal over crimes against humanity and against peace since no state has legislation or authority in the matter because the crimes were not codified in international law.

Challenges to ICC jurisdiction. Jurisdiction over non-ICC nationals

Objections to ICC jurisdiction over non-ICC nationals in situations such as Afghanistan and Palestine are a matter of concern for the US and Israeli governments. Such situations are

the subject of preliminary investigation and involve the Commission of ICC crimes by non-ICC nationals in the territory of ICC states.

One case that is worth mentioning is that of Bosco Ntaganda, a citizen of Rwanda, a non-ICC state, who was convicted of war crimes and crimes against humanity in the Democratic Republic of Congo.⁶⁹ We recall also in this context, the attacks carried out against South Korean targets by North Korean citizens,⁷⁰ the commission of ICC crimes on the territory of Georgia by Russian citizens,⁷¹ the commission of ICC crimes on the territory of Bangladesh by officials coming from Myanmar, the related referral noted by the Union of Comoros in the attack of the Israel Defense Forces on the MV Mavi Marmara, a Comoros-registered vessel that was part of the flotilla heading to

⁶⁹Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, par. 1 (8 July 2019).

⁷⁰Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in the Republic of Korea, International Criminal Court, (23 June 2014), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-conclusion-preliminary> Accessed on 22.09.2025. Office of the Prosecutor, International Criminal Court, Report on preliminary examination activities, par. 27 (2011): “(...) South Korea also referred the shelling of Yeonpyeong Island on 23 November 2010, which resulted in several deaths, multiple injuries to civilians and military personnel and significant property destruction (...) Preliminary Examination was ultimately closed on 23 June 2014, after the Prosecutor concluded that war crimes (...)”.

⁷¹Situation in Georgia: ICC Pre-Trial Chamber Delivers Three Arrest Warrants, International Criminal Court (30 June 2022), <https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants> Accessed on 22.09.2025.

Gaza and,⁷² the situation in Ukraine for war crimes, crimes against humanity and genocide committed by Russian citizens operating on the territory of Ukraine (Tuzmukhamedov, 2021; Peskov, 2023; Schabas, 2025).⁷³

The US raised no objections to the relative exercise of the ICC jurisdiction in the Ntaganda case. The US transferred the accused from the US embassy in Kigali to the ICC.⁷⁴ Complaints have arisen concerning North Korean or Russian citizens and the US and Israel have protested against the jurisdiction of the ICC over citizens,⁷⁵ a position which the US

⁷²Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13, Decision on the “Application for Judicial Review by the Government of the Comoros”, par. 3 and 4 (16 September 2020). Letter from Ramazan Aritürk & Cihat Gökdemir, Union of the Comoros, to Fatou Bensouda, Prosecutor, International Criminal Court (14 May 2013). Office of the prosecutor, International Criminal Court, situation on registered vessels of Comoros, Greece and Cambodia, article 53, par. 1, Report, par. 14 (2014), 19, 24-26: “(...) there was a reasonable basis to believe that war crimes had been committed (...) the attack on the flotilla did not meet the “gravity” threshold of the statute, given the limited jurisdictional reach of the investigation to vessels registered to ICC States Parties, and declined to open an investigation (...) Comoros challenged the Prosecutor’s decision, and she was required to reconsider it (...)”.

⁷³Assembly of States Parties, International Criminal Court, Delegations to its Fourth Session, ICC-ASP/4/INF.1/Rev.1, at 37 (12 December 2005).

⁷⁴Congolese Warlord Bosco Ntaganda Now in Custody of International Criminal Court, UN NEWS (22 Mar. 2013), <https://news.un.org/en/story/2013/03/435182> (Accessed on 22.09.2025): “(...) did not object to the U.S. handover to the ICC, noting that the decision was “not Rwanda’s business” as the embassy was U.S. territory (...)”:

⁷⁵U.N. Diplomatic Conference, op. cit., 42nd mtg. of the Comm. of the Whole, par. 28, at 362. Assembly of States Parties, Int’l Crim. Ct., Statement of the Chinese Observer Delegation to the Twenty-First Session (6 December

again followed during the Rome conference.

The practice of US citizens and allies has not allowed the ICC to gain US consent. The Bush administration has negotiated more than one hundred bilateral immunity agreements for ICC member states thus imposing not to hand over US citizens to the ICC.⁷⁶

A letter sent in 2002 from John Bolton the former Under-Secretary for Arms Control and International Security to the Secretary General of the UN stating that the US did not want to become a party to the StICC.⁷⁷

After this letter the Prosecutor called for the opening of investigations into crimes committed in Afghan territory including members of the US, armed forces as well as the CIA at secret detention centers (Liakopoulos, 2019a; Liakopoulos, 2024a).⁷⁸

2022): “(...) China congratulated the court on its twentieth anniversary but noted with “concern” the court’s jurisdiction in the Bangladesh/Myanmar and Philippines situations, which it suggested might be problematic in light of “sovereignty and the principle of state consent (...)”.

⁷⁶On 1 April 2021, President Joe Biden repeated this position. Exec. Order No. 14022, 86 Fed. Reg. 17895 (1 April 2021).

⁷⁷Letter from John R. Bolton, Under Secretary of State for Arms Control & Int’l Sec., to U.N. Secretary-General Kofi Annan (6 May 2002).

⁷⁸International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan, International Criminal Court, (20 November 2017), <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation> Accessed on 22.09.2025.

Some US officials argued that the opening of investigations and inquiries in Afghan territory violated treaty law since a treaty could not bind a non-party state, taking up the theory of delegation (Afghanistan, 2023). In fact, according to M. Newton:

“(...) Afghanistan and Palestine entered into binding agreements that ceded exclusive jurisdiction over Americans and Israelis (...) for crimes committed on the territory of the state (...) transfer of territorial jurisdiction from the state to the ICC via ratification of the Rome Statute therefore could not have included Americans or Israelis (...)” (Newton, 2016).

The prosecutor of the ICC rejected this position, noting that the ICC has the right to exercise its jurisdiction for alleged crimes committed in Afghan territory regardless of the nationality of the accused involved.⁷⁹ This is an approach that takes note of the negotiating positions of the US in Rome.

The prosecutor emphasized and put at the forefront the exercise of criminal jurisdiction that was present in multilateral treaties thus addressing slavery, piracy, genocide, apartheid, currency counterfeiting, war crimes, drug trafficking, sabotage on the high seas, diplomatic attacks, hostage-taking, torture, etc. The prosecutor stated in this regard

“(...) conferral or delegation of jurisdiction by a party to a treaty to an international jurisdiction (...) having been the basis for the establishment of

⁷⁹Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15,” par. 44, n. 42 (20 November 2017).

the Nuremberg Tribunal (...).⁸⁰

The prosecutor rejected the positions of Afghanistan.

Art. 98 StICC (Ambos, 2022) does not affect the jurisdiction of the ICC but refers only to the executive jurisdiction of the ICC.

The prosecutor also rejected the first investigations which served only the interests of justice (Vasiliev, 2019).⁸¹ The trial chamber was in line with the positions of the prosecutor. The nationality of the accused and the presence of the SOFA for the US and Afghanistan prevented the ICC from exercising jurisdiction.⁸² According to the trial chamber:

“(...) in full or in part on the territory of Afghanistan or of other State Parties fall under the Court’s jurisdiction, irrespective of the nationality of the offender (...) jurisdiction if the conduct was either completed in the territory of a State Party or if it was initiated in the territory of a State Party and continued in the territory of a non state party (...).⁸³

The archiving of the Trial Chamber was later annulled by the Appeal Chamber thus causing a rapid position of nervousness in

⁸⁰Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15,” par. 45, op. cit.

⁸¹Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, par. 33 (12 Apr. 2019): “(...) Pre-Trial Chamber’s decision was controversial as it referenced, among other factors, the continued likely non- cooperation with the ICC as a reason for refusing permission to investigate (...) widely understood to be a reference to U.S. noncooperation and threats (...).”

⁸²Article 15 Decision, ICC-02/17, par. 58-59.

⁸³Article 15 Decision, ICC-02/17, par. 50.

US.⁸⁴

Secretary of State Mike Pompeo noted that officials of the Office of the Prosecutor and their families faced sanctions after their authorizations for the Afghanistan investigation (Buchwald, Crane, Ferencz, Rapp, Scheffer, Williamson, 2020) calling their attempt unjust to investigate and prosecute Americans (De Falco, 2020). From 11 June 2020 President Donald Trump has placed an execution order stating that:

“(...) illegitimate assertions of jurisdiction over personnel of the United States and certain of its allies (...) the sovereignty of the United States (...) non-consensual assertion of jurisdiction (...) unusual and extraordinary threat to the national security and foreign policy of the United States (...) constitutes a national emergency (...)”.⁸⁵

The related executive order imposed extraordinary sanctions

⁸⁴Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (5 March 2020): “(...) a deferral of the investigation under Article 18(2) of the Rome Statute, on the basis that it was investigating the allegations itself (...) ICC investigation, but on 27 September 2021, ICC Prosecutor Karim A.A. Khan requested authorization to resume the investigation, focusing on Taliban and Islamic State-Khorasan Province crimes (...)”. Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan, International Criminal Court (27 September 2021), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> (Accessed on 22.09.2025). Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, par. 58 (31 October 2022).

⁸⁵Executive Order No. 13928, 85 Fed. Reg. 36139 (11 June 2020).

(Anderson, 2020). The sanctioned individuals were two African officials who arose suspicion based on the motivation of the Trump administration which was racially motivated (Kersten, 2020). The sanctions were lifted and the Biden administration's executive order continued to maintain objections in US to the relevant jurisdiction of the ICC in particular:

“(...) personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council (...)”.⁸⁶

The situation in Palestine has raised questions regarding the jurisdiction of the ICC over nationals of non-member states. Since January of 2015 Palestine has acceded to the StICC. In 2018⁸⁷ it has filed a complaint asking the prosecutor to initiate and investigate past and future crimes that are committed in its territory⁸⁸ by Israeli citizens (Pellet, 2010; Shany, 2010; Ronen, 2014; Liakopoulos, 2024b).⁸⁹

On 22 January 2020 the prosecutor after a preliminary question on jurisdiction submitted confirmed that the ICC exercises its

⁸⁶Executive Order No. 14022, 86 Fed. Reg. 17895 (1 Apr. 2021).

⁸⁷Letter from Mahmoud Abbas, President of the State of Palestine, to the International Criminal Court (31 December 2014). The State of Palestine Accedes to the Rome Statute, ICC (7 January 2015), <https://www.icc-cpi.int/news/state-palestine-accedes-rome-statute> Accessed on 22.09.2025.

⁸⁸Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, Situation in the State of Palestine, ICC-01/18, par. 9 (15 May 2018).

⁸⁹Situation in the State of Palestine, ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, par. 2 (22 January 2020).

jurisdiction according to art. 12, par. 2, letter a). It has included in its investigations the occupied Palestinian territory, namely the West Bank, East Jerusalem and Gaza.⁹⁰

The prosecutor argued that the scope of the ICC's jurisdiction in the dispute between Israel and Palestine was justified and that the states had expressed interest and concerns on the relevant issues.⁹¹ The Palestinian rejected the Oslo Accords. It has also agreed that Israel has its own jurisdiction over crimes committed by Israelis on Palestinian territory without allowing Palestine to delegate its prescriptive and judicial jurisdiction.⁹² The question was coherent and used to describe the jurisdiction of the ICC.⁹³ It has stated in this regard

“(...) a resolution of the state's potential conflicting obligations is not a question that affects the court's jurisdiction (...) may become an issue of cooperation or complementarity during the investigation and prosecutions stages (...)”.⁹⁴

Amicus curiae briefs were submitted by non-governmental organizations, individuals, states and organizations.⁹⁵ Four states of the StICC opposed Palestine's accession to the StICC⁹⁶ in the

⁹⁰Article 19(3) Request, ICC-01/18, par. 5.

⁹¹Article 19(3) Request, ICC-01/18, par. 35.

⁹²Article 19(3) Request, ICC-01/18, par. 183.

⁹³Article 19(3) Request, ICC-01/18, par. 184.

⁹⁴Article 19(3) Request, ICC-01/18, par. 185.

⁹⁵Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution Re- quest Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, par. 12 (5 February 2021).

⁹⁶U.N. Secretary-General, Communication by Canada on the Rome Statute of the International Criminal Court, C.N.57.2015.TREATIES-

Assembly of States Parties to the ICC (ASP), such as Canada,⁹⁷ Germany, the Netherlands and the UK.⁹⁸ A group of seven states such as Austria, Brazil, the Czech Republic, Australia, Germany, Uganda, Hungary, the Arab League submitted related briefs. Five argued that Palestine was not a state⁹⁹ and that they did not recognize Palestine as a state.

Brazil recognized Palestine as a state but was also concerned “about the investigations that perhaps compromised a just and negotiated political solution”¹⁰⁰. In this spirit was the memory from Germany that took into consideration the theory of

XVIII.10 (Depositary Notification) (23 January 2015): “(...) Canada believes that “Palestine does not meet the criteria of a state under international law” and “is not able to accede” to the Rome Statute (...)”.

⁹⁷Statement by Canada, Germany, the Netherlands, and the United Kingdom of Great Britain and Northern Ireland in Explanation of Their Position Concerning the Use of the Term “State of Palestine,” in Bureau of the Assembly of States Parties, International Criminal Court, 7th mtg., Agenda and Decisions, annex II (15 November 2016).

⁹⁸Submission of Observations Pursuant to Rule 103 by the Czech Republic, Situation in the State of Palestine, ICC-01/18, par. 4 (12 March 2020); Observations of Australia, Situation in the State of Palestine, ICC-01/18, par. 12 (16 March 2020); Written Observations by Hungary Pursuant to Rule 103, Situation in the State of Palestine, ICC-01/18, par. 3 (16 Mar. 2020); The Observations of the Republic of Uganda Pursuant to Rule 103 of the Rules of Evidence and Procedure, Situation in the State of Palestine, ICC-01/18, parr. 11-12 (16 March 2020).

⁹⁹Situation in the State of Palestine, ICC-01/18, par. 4 (15 March 2020): Austria concluded that Palestine’s accession did not render it a “state” under international law, as it had not recognized Palestine. *Amicus Curiae* Observations of the Republic of Austria.

¹⁰⁰Situation in the State of Palestine, ICC-01/18, par. 34 (16 March 2020): Brazilian Observations on ICC Territorial Jurisdiction in Palestine.

delegation that considers Palestine as a state.¹⁰¹ The depositary could not delegate a criminal jurisdiction of a judicial and/or prescriptive nature to the ICC because:

“(...) Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 1995 [the Oslo Accords] (...) stipulates that the Palestinians have no criminal jurisdiction over Israeli nationals (...)” (Peralta, 2015).¹⁰²

The League of Arab States, which is part of a group of twenty-two countries some of which are parties to the ICC, held that Palestine is a state and its occupation does not deprive its sovereignty and ability to grant jurisdiction at the ICC.¹⁰³

The Trial Chamber by majority decided to review the outcome of the accession procedure. Palestine acceded to the StICC¹⁰⁴ as a state party to the statute based on art. 12, par. 2, letter a) StICC.¹⁰⁵ The ICC agreed that the prosecutor has jurisdiction to

¹⁰¹Situation in the State of Palestine, ICC-01/18, par. 16 (16 March 2020): Observations by the Federal Republic of Germany.

¹⁰²Situation in the State of Palestine, ICC-01/18, par. 16 (16 March 2020), par. 28: “(...) Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), art. XVII(2)(C), U.N. Doc. A/51/889 (1995) (...) territorial and functional jurisdiction of the [Palestinian Authority] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement (...) Palestine has argued that the Accords no longer apply as it has repudiated them (...)”. The State of Palestine’s Response to the Pre-Trial Chamber’s Order Requesting Additional Information, Situation in the State of Palestine, ICC-01/18 (4 June 2020).

¹⁰³Submission of Observations, League of Arab States, Situation in the State of Palestine, ICC-01/18, par. 32 (16 March 2020).

¹⁰⁴Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, par. 99 (5 February 2021).

¹⁰⁵Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s

investigate according to art. 12 the territories occupied by Israel in 1967, including the West Bank, Gaza, and East Jerusalem.¹⁰⁶

The majority rejected the view that the Oslo Accords affected the territorial jurisdiction of the ICC.¹⁰⁷

Judge Kovács in a dissenting opinion noted that the Chamber had to revise the question of Palestinian statehood based on an interpretation of Art. 12 StICC and not on Palestine's accession to its statute.¹⁰⁸ An analysis that led to the conclusion that Palestine is not a state under international law.¹⁰⁹ It was only a state party to the StICC (Ambos, 2022).¹¹⁰

Palestine was approached as a nascent state without full sovereignty and the provisions of the Oslo Accords deprived Palestine of effective jurisdiction. The majority accepted the delegation theory as an obstacle to the exercise of jurisdiction over the Palestinian situation since judge Kovács was inclined to suggest jurisdictional limits to executive jurisdiction in Palestine

Territorial Jurisdiction in Palestine, par. 104-113.

¹⁰⁶Situation in the State of Palestine, ICC-01/18, Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, par. 118.

¹⁰⁷Situation in the State of Palestine, ICC-01/18, Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, par. 129.

¹⁰⁸Situation in the State of Palestine, ICC-01/18, Judge Péter Kovács' Partly Dissenting Opinion, parr. 28-34 (5 February 2021).

¹⁰⁹Situation in the State of Palestine, ICC-01/18, Judge Péter Kovács' Partly Dissenting Opinion, parr. 261-267.

¹¹⁰Situation in the State of Palestine, ICC-01/18, Judge Péter Kovács' Partly Dissenting Opinion, par. 267.

thus limiting the prescriptive, judicial jurisdiction of the ICC.¹¹¹

Jurisdiction for high-ranking government officials

Speaking of high-ranking government officials jurisdiction we refer to a part of the StICC relating to the jurisdiction of the ICC over citizens of a state party and especially to the president of the state of Sudan, Omar Al-Bashir indicting him on charges of genocide for crimes against humanity, war crimes and, arrest warrants.¹¹²

Arrest warrants that provoked a series of opinions contesting the jurisdiction of the ICC.

Some states parties argued that the principles of international law applicable to national systems affected their relations with the ICC. This meant that the head of state could not be handed over to the ICC without a waiver of immunity by the state of citizenship since the ICC did not have jurisdiction and the state did not have the relevant power to delegate it. This position was based on Art. 27, par. 1 StICC (Ambos, 2022) and refers to Art. IV of the Genocide Convention¹¹³:

¹¹¹Situation in the State of Palestine, ICC-01/18, Judge Péter Kovács' Partly Dissenting Opinion, par. 365.

¹¹²Arrest warrants were issued in 2009 and 2010. Prosecutor v. Al-Bashir, ICC-2/05-01/09, Case Information Sheet (July 2019).

¹¹³Article IV of Genocide Convention affirms that: "(...) Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals (...)".

“(...) customary international law rule that whatever immunities an official might otherwise have under international law cannot be pled as a bar or a defense to criminal responsibility, *ratione materiae* (...)” (Sadat, 2020).

Art. 27, par. 1 and 2 was not uncontested during the negotiation of the Rome Statute (Saland, 1999). The ICTY and ICTR represented a norm of customary international law.¹¹⁴ The Supreme Court of the US did the same in the Charles Taylor case.¹¹⁵ Some decisions are connected with the ICJ in the case of arrest warrant where:

“(...) immunities enjoyed under international law (...) do not represent a bar to criminal prosecution in certain circumstances (...) criminal proceedings before certain international criminal courts (...)”.¹¹⁶

In 2017, the government of Jordan refused to arrest Sudanese President Omar Al-Bashir when he appeared in Jordan to attend the 28th Arab League Summit, arguing that he was immune as president of a member state.¹¹⁷

¹¹⁴ICTY Statute, supra note 32, art. 7(2); ICTR Statute, op. cit., art. 6(2). Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, par. 28 (International Criminal Tribunal for the Former Yugoslavia 8 November 2001: “(...) Jean Kambanda, who had pled guilty before the ICTR, had not asserted his immunity as the former Prime Minister of Rwanda in the case brought against him for genocide (...)”).

¹¹⁵Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, par. 52 (31 May 2004).

¹¹⁶Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Arrest Warrant Case), Judgment, 2002 I.C.J. 3, par. 61 (14 February).

¹¹⁷Prosecutor v. Al-Bashir, ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, par. 8 (11 December 2017).

The Trial Chamber found against Jordan and the case was appealed. In appeal chamber Jordan noted that the fundamental norms and principles of international law allowed for the refusal and execution of the ICC's arrest warrant against a basis of presumed immunity.¹¹⁸ Jordan did not impose obligations and/or deny rights to states that were not parties to the statute.¹¹⁹ Thus, the case before the ICC is assimilated to also involving immunity from the jurisdiction of other states, arguing that the ICC was a foreign court.¹²⁰ The Appeal Chamber of the ICC found that the ICC is not a foreign court but an internationally inspired court.¹²¹ Jordan had to arrest Al-Bashir.¹²² The Appeal Chamber based its case on customary international law¹²³

¹¹⁸Prosecutor v. Al-Bashir, ICC-02/05- 01/09, par. 5 (12 March 2018): “(...) The Hashemite Kingdom of Jordan’s Appeal Against the Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir (...)”.

¹¹⁹Prosecutor v. Al-Bashir, ICC-02/05- 01/09, op. cit., parr. 59–64.

¹²⁰Prosecutor v. Al-Bashir, ICC-02/05- 01/09, par. 64. Also, Dire Tladi argued the same thing to the Appeals Chamber according to the Transcript of Appeals Hearing, Prosecutor v. Al-Bashir, ICC-02/05-01/09, at 89 (10 September 2018).

¹²¹Prosecutor v. Al-Bashir, ICC-02/05-01/09, Transcript of Appeals Hearing, at 16 (11 September 2018).

¹²²Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, par. 119 (6 May 2019).

¹²³Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, par. 20 (18 June 2018): “(...) Observations of Professor Claus Kress as *Amicus Curiae*, with the Assistance of Ms Erin Pobjie, on the Merits of the Legal Questions Presented in “The Hashemite Kingdom of Jordan’s Appeal Against the “Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender [of]

arguing that international law has removed its immunity from Al-Bashir and highlighted a position stating that:

“(...) state practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court (...) such immunity has never been recognised in international law as a bar to the jurisdiction of an international court (...)”¹²⁴.

The Appeal Chamber highlighted the absence of a customary international law rule recognising the immunity of the Head of State before a *super partes* court stating that:

“(...) different character of international courts when compared with domestic jurisdictions (...)”.¹²⁵

National jurisdictions have constituted an expression of sovereign power for a state that is limited to the sovereign power of other states. In this case, international courts act only on behalf of the international community as a whole (Sadat, 2019).¹²⁶

The efforts of Jordan and Sudan have challenged the

Omar Al-Bashir” of 12 March 2018 (...)”.

124 Judgment in the Jordan Appeal, ICC-02/05-01/09 OA2, par. 1.

125 Judgment in the Jordan Appeal, ICC-02/05-01/09 OA2, 115, 115–116. See also The Lotus Case, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (7 September).

126 Judgment in the Jordan Appeal, ICC-02/05-01/09 OA2, par. 115: “(...) five-member unanimous decision, accompanied by a four-judge concurrence of nearly 200 pages further elaborating on the head-of-state immunity question (...)”. Prosecutor v. Al- Bashir, ICC-02/05-01/09 OA2, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (6 May 2019): “(...) Joint Concurring Opinion, while interesting, added complexity to the case by taking up issues not directly before it, such as the question of the outer limits of the term “international court” (...)”.

applicability of art. 27 as an attempt to rewrite customary international law relating to the immunity of heads of state before international courts and/or tribunals.¹²⁷

Jordan did not argue that the case was based on the doctrine of delegation. Instead, it has adopted the doctrine of delegation on the jurisdiction of the ICC.

Jordan argued that the referral of the Security Council in the Darfur situation did not include a waiver of immunities. This means that the ICC cannot proceed against Al-Bashir without a waiver by the Sudanese government.¹²⁸

The Appeal Chamber of the ICC rejected the universal position expressed in the Tadić case which was within the spirit of Nuremberg and which established:

“(...) a new rule of customary international law (...) namely that international immunities do not apply to international criminal prosecutions for certain international crimes (...)” (Akanke, 2009).

The geographical extent of the jurisdiction of the ICC

Thinking and investigating the geographical extent of the jurisdiction of the ICC we immediately think of the Bangladesh/Myanmar case. The Security Council has referred to situations involving citizens of states and non-state parties who have committed crimes to the ICC.¹²⁹

¹²⁷Judgment in the Jordan Appeal, ICC-02/05-01/09 OA2, par. 116.

¹²⁸Judgment in the Jordan Appeal, ICC-02/05-01/09 OA2, parr. 64–66.

¹²⁹Article 13, par. b) StICC.

In cases referred by states the office of the prosecutor has affirmed its universality which is bound by limits imposed by art. 13 in the form of preconditions concerning the exercise of jurisdiction and the nationality of the accused or the state on its territory that the crimes that are parties to the statute are committed.¹³⁰

A crime originates in the territory of a non-party state and is consummated in the territory of a party state that has effects on it. This is a classic scenario of international criminal law that dates back many years recalling the Lotus case of the Permanent International Court of Justice (PICJ). In that case, the state has originated crimes that the state perceives its effects exercising criminal jurisdiction over persons accused of having committed such crimes.¹³¹

The StICC has based on the spirit of Nuremberg, i.e. in a principle of national and extraterritorial criminal jurisdiction expressed in the international sphere. The court exercises jurisdiction over serious crimes of concern to the international community that threaten international peace and security according to Art. 22 of the preamble of the StICC. And the questions that arise now are: should/can the judges interpret the statute restrictively? Is the exercise of jurisdiction allowed in the

¹³⁰Article 12, par. 2, lett. 3) StICC.

¹³¹PCIJ, The Lotus Case, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 30 (7 September).

Bangladesh/Myanmar case and in the Ukraine/Russian Federation case?

The ICC highlighted in the Bangladesh/Myanmar case the possibility for the Prosecutor to proceed with the investigation under the jurisdictional provisions of the statute. The request was based on the jurisdictional provisions of the ICC statute.

The large number of individuals who were displaced from Myanmar to Bangladesh after the brutal attacks against the Rohingya in 2017 forced them to cross the border to refugee camps creating a situation that amounts to ethnic cleansing and genocide (Al Husein, 2017).

The Trial Chamber I concluded in 2018 the relevant prerequisites for its exercise based on Art. 12, para. 2, letter a) StICC (Ambos, 2022). In doing so, it sought to satisfy a legal element of a crime falling within the jurisdiction of the ICC and/or part of a crime committed on the territory of a State Party.¹³²

The ICC exercises its jurisdiction in circumstances in which States Parties are entitled to assert jurisdiction over crimes under their own legal systems. The principles of criminal jurisdiction vested in the ICC are interpreted in accordance with the

¹³²Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," par. 64 (6 September 2018).

principle of territoriality, art. 12 and applied in the Myanmar/Bangladesh case.¹³³

Direct evidence through the *travaux préparatoires* of the Rome Statute explicitly addresses the effects of territoriality. Principles that are consolidated as matters of general international law in inter-state cases, according to Art. 21, para. 2, letter b) StICC (Ambos, 2022), requiring the ICC to apply customary international law. In the event of ambiguities arising on the part of the statute it seems reasonable for the Chamber to make use of art. 12, para. 2, letter a) as it has done so far.

The Trial Chamber III confirmed the jurisdiction of the ICC finding that in the case of expulsion the relevant conduct of art.12, par. 2, letter a) was coercive activity that forced the victim to cross a border concluding that part of the *actus reus* of the crime of expulsion occurred within the territory of Bangladesh.¹³⁴

After examining the national jurisdictions the Chamber concluded that customary international law granted the relevant exercise of jurisdiction for cross-border cases given that there is

¹³³Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," par. 70.

¹³⁴Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, par. 53 (14 November 2019).

no evidence of international law. Also, in this regard, the Rome Statute questioned whether the jurisdiction of the ICC was limited to crimes committed exclusively in the territory of one or more member states. The Chamber highlighted that:

“(...) states delegated authority to an international organisation (...) to achieve the purposes for which the authority was granted to the organisation (...)”.¹³⁵

The jurisdiction of the ICC for war crimes that are committed in international armed conflicts are based on Art. 8 StICC (Ambos, 2022).

The Chamber considered them incompatible with the principle of good faith. The Chamber considered the actual interpretation of the statute as a limitation that prevents the court from examining cases involving war crimes committed in international armed conflicts by non-party states.

The Chamber thus concluded that the transfer to the ICC is based on principles of international law. From a theoretical point of view the opinion of the ICC seems confused. The transfer of jurisdiction as the Chamber observed at the ICC includes within it the necessary powers to achieve its objectives.

Likewise the conferral that is based on the concept of delegation

¹³⁵Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, par. 57.

is limited. The best view is that the States Parties have vested in the ICC the authority to exercise a criminal jurisdiction that accepts in international law what is pre-established by the Nuremberg Principles as well as the universal jurisdiction over core crimes (Soler, 2019) of *jus cogens* independent of national laws as the subject of its own limits that are imposed by the Rome Statute.

What are the limitations on the jurisdiction conferred on the ICC?

The jurisdiction of the ICC, according to the theory of conferral, respects variants that come from delegation. There are legal limits as well as practical and political constraints in this regard. Limits that impose in the StICC practical and political controls on the power of the ICC. The orientation of Nuremberg and the standards in the field of human rights concern a series of limits on the exercise of a criminal jurisdiction by the ad hoc tribunals and the ICC.

The Nuremberg crimes are prosecutable before international courts. They are crimes under international law and customary law (principle I). Principle IV of Nuremberg specifies the crimes punishable under international law, i.e. crimes against peace; crimes against humanity, war crimes. Fundamental crimes that are part of Art. 5 StICC (Ambos, 2022) by adding genocide as a

specific and specialized form for crimes against humanity.

The draft of the code of crimes against the peace and security of humanity of the ILC of 1996 (Liakopoulos, 2020c) intended to highlight and complement the draft of the StICC that was adopted two years later. A list of crimes, i.e. crimes under international law that are punishable independently of the fact that are punishable under national law do not derive from national law and are independent of it. A project that aims to exercise jurisdiction over international crimes under art. 8.¹³⁶

Princeton Principles (Ratner, Abrams, 2001; Macedo, 2001) include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, torture, serious crimes under international law (Nagle, 2011) that a state takes into account (Ascensio, Bonafè, 2018).¹³⁷

Crimes that originate even before 11 September 2001 in the US. They include terrorism as an object of international treaties according to the StICC. The first treaty for an international court to punish terrorism was adopted in 1937 but it never came into

¹³⁶Report of the International Law Commission on the Work of its Forty-Eighth Session, par. 50, Draft Code of Crimes Against the Peace and Security of Mankind, arts. 16–20, 51 U.N. GAOR Supp. 10, U.N. Doc. A/51/10 (1996).

¹³⁷U.N. Diplomatic Conference, op. cit., Final Act, annex I, res. E, at 71-72, U.N. Doc. A/CONF.183/13 (Vol. I). This issue has also come up at the International Law Commission in its Report on Immunities of State Officials from Foreign Criminal Jurisdiction. Report of the International Law Commission, 77 U.N. GAOR Supp. 10, U.N. Doc. A/77/10, at 240-241 (2022).

force (Dubin, 1993).¹³⁸ Even for the crime of genocide there was a long campaign to be included in the jurisdiction of the ICC (Mackintosh, Oldring, 2022).

(Follows). Immunity for heads of state and their fate before international courts

In 2002 the ICJ issued an arrest warrant against a Congolese foreign minister.¹³⁹

The court's sentence considered that for an individual associated with the commission of various crimes, immunity and consequently impunity were equivalent. In par. 61 of the sentence the incumbent and former foreign ministers pursued scenarios for: -their own countries involved; -a third state after renouncing their immunity; -a prosecution of a third state for acts committed before or after their term of office for acts that are committed during their term of office and -a minister in office who is subject to criminal proceedings before certain international criminal courts and has jurisdiction over the ICC with reference to and based on Art. 27, par. 2 StICC (Ambos,

¹³⁸See Draft Convention for the Creation of an International Criminal Court opened for signature at Geneva, 16 November 1937; Convention for the Creation of an International Criminal Court, reprinted in U.N. Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, U.N. DOC. A/CN.4/7/Rev.1, app. 8, U.N. Sales No. 1949.V.8 (1949).

¹³⁹Arrest Warrant Case, Judgment, 2002 I.C.J. 3, par. 78(2) (14 February).

2022)).¹⁴⁰

The arrest warrant case is complex. The same is true for the indictment of Omar Al-Bashir, former President of Sudan, by the ICC in 2010. The Appeal Chamber agreed that Al-Bashir was not immune. Four judges of the Appeal Chamber of ICC attached a different opinion that expanded the final judgment.¹⁴¹

An international court as a judicial body exercises its jurisdiction upon the request of two states. Jurisdiction is conferred in various ways. For example, through a treaty, an instrument of promulgation, referral, accession by an international body, an official authorized to do so and by accession and/or referral to an arbitration clause that is contained in a treaty.¹⁴² States pool their collective sovereign will to create a court in order to exercise the jurisdiction of a single sovereign as well as the jurisdiction of sovereigns interested inter se.

The judgment that was expressed through the dissenting opinion was unsatisfactory. An opinion that did not report the limits of its concept. A court established under the spirit of the UN. It is open to all member states of the UN. It was linked to the

¹⁴⁰Arrest Warrant Case, Judgment, 2002 I.C.J. 3, par. 61.

¹⁴¹Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (6 May 2019).

¹⁴²Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, par. 56.

Security Council according to Art. 13, par. b) and art. 16 StICC. The ICC was entitled to exercise its jurisdiction over international crimes possessing important characteristics that make it international. Thus, a process of concluding treaties that were open to all states was negotiated and established.

A group of over 120 member states obtained jurisdiction through referrals to the Security Council and declarations. Crimes were recognized as codifications of customary international law. The ICC is not yet so universal and thus seems to have the indicators of a legitimacy that ask the Nuremberg principles for a modern law on human rights.

The Al-Bashir case did not include the judgment of Charles Taylor from the Supreme Court of the US¹⁴³ establishing that the Supreme Court of US after the UN treaty could establish a court in Sierra Leone of international inspiration seen as an agreement of the expression of the will of the international community according to the negotiation with the UN.

After the Al-Bashir judgment the ICC issued questions and answers explaining what the decision meant for the ICC. It was an adequate jurisdiction that entered into the exception of an international court regarding the arrest warrant. The claim for the ICC to prevent for the international community some crimes does not mean that it goes in parallel with the principle of

¹⁴³Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004).

universality.

The ratifications of the genocide convention exceeded the 150 states.¹⁴⁴ This means that forty member states of the UN have not ratified it and that there is a consensus on the fact that the prohibition of genocide is a norm of universal nature (Mègret, 2019).

Perhaps the additional criteria for a truly international court were not accompanied by the number of states. Perhaps we need a legitimate attempt to provide the international community with a complex for a judicial body that respects the *ius puniendi*. The negotiation and the accession of this treaty should be open to all states.

(Follows). Facts and laws for a fair trial in international criminal law

The principle of fair and just trial has been based on facts concerning the principle V of the Nuremberg. This is an important principle that according to modern international standards on human rights is recognized for the accused. It is based on the presumption of innocence, the possibility of defending oneself by a lawyer during all the states of the

¹⁴⁴Ratification of the Genocide Convention, United Nations: Office on Genocide prevention and the responsibility to protect: <https://www.un.org/en/genocideprevention/genocide-convention.shtml> Accessed on 22.09.2025.

defense.

The draft Criminal Code of the ICC includes guarantees of a judicial nature within art. 11 and the protection of the double jeopardy of art. 12 relating to the principle of the *non bis in idem* and the non-retroactivity according to art. 13, which establishes the mitigating circumstances of articles 13 and 15.

The StICC based on article 66 and 67, that is, on the rights to a fair trial such as the presumption of innocence, the right to be informed of one's charges, a fair hearing, the right to choose one's own lawyer, to be tried without delay, to examine the witnesses against oneself, to have an interpreter and necessary translations free of charge, to have proceedings conducted in a language understandable, etc.

Rights that are part of many penal codes. They ensure fundamental guarantees of fairness towards its defendant as well as the credibility and legitimacy of the institution that serves as a model for national judicial systems throughout the world. We speak for an international court that exercises its international jurisdiction in a legitimate and important way. Thomas Franck also refers in this regard: “legitimacy of rules and institutions exerts a compliance pull on those addressed” (Franck, 1990).

What is the legitimate meaning of the jurisdiction of the ICC? A clear and precise factor that symbolically validates and indicates legitimacy. In a similar way David Luban relied on the

legitimacy of international courts that comes from fairness and state authorization (Luban, 2010).

If the ICC was able to try President Vladimir Putin as an *ad hoc* court created by Russia and Belarus does this not mean that it cannot also try President Volodymyr Zelensky?

The answer does not have to do with interstate and/or international tribunals since they are not in themselves illegitimate and that *ad hoc* tribunals immediately raise questions regarding selectivity and legitimacy as many have also argued in relation to proposals to create *ad hoc* tribunals after the related aggression committed against Ukraine (Luban, 2010; Heller, 2022; Hathaway, 2022; Pollman, 2022; Peake, 2023; Kolliopoulos, 2024).

An *ad hoc* tribunal as a retaliatory political response may be illegitimate by its very establishment and functioning as well as by its effects. The basis of the *ius puniendi* and the universality of the ICC based on theories of national delegations does not mean that they justify the creation of international criminal tribunals as well as everything that violates international law.

The UN unlike the ICC or the Special Tribunal for Sierra Leone is not involved in an establishment of a tribunal between Russia and Belarus. The history of trials against political opponents and the rule of law in the Russian Federation is likely that the process is not fair and based on facts and the law. The tribunal

and its indictments are acceptable.

A bad faith response to international law does not remove the standards of international law for states that respect the law as well as the condemnations, the abuse, the bad faith that refuses to recognize even its own effects.

Political and practical obstacles

The related political and practical obstacles are ensured through the very content of the StICC and the intentions of the negotiators of the statute. The power of the ASP to control the ICC, supervise its activities and make recommendations to ensure its efficiency and proper operation is the same as what happened with the Independent Expert Review.¹⁴⁵

Every state has the sovereign right to join and leave the statute at any time. Concerns of mass withdrawal in African states, especially in Burundi are noted. Burundi was the only African country that withdrew from the ICC due to the open investigations of the office of the prosecutor for alleged crimes of the ICC committed on its territory.

The weak enforcement regime of the statute together with the principle of complementarity (De Vos, 2020) means for states that the prosecutor does not coerce and does not comply without

¹⁴⁵Assembly of States Parties, International Criminal Court, Resolution Establishing Review of the International Court and the Rome Statute System, ICC-ASP/18/Res.7 (6 December 2019).

the support of the Security Council.

States have the power to amend the Rome Statute limiting thus its application under art. 12, precluding its application to nationals of non-party states and eliminating art. 27, par. 2 of the statute as a guarantee of immunity for heads of state before the ICC (Ambos, 2022). Therefore, this was not happened so far and does not constitute conclusive evidence for state approval.

The jurisprudence of the ICC places the role of the prosecutor and of judges in subjects that have to do with Art. 46 StICC when it is ascertained that they have committed grave misconduct by violating their duties in the statute (Fuller, 1964).

Conclusion

A legal norm contains general, public, equitable and certain principles. This is an important distinguishing feature for the court, an independent body that responds to legal questions, principles and rules of law.

The notion of delegated jurisdiction is used to describe the relationship between national systems and international courts such as international courts that are bound by international law according to their founding statutes and not by national laws of the states that created them.

An international panorama of international courts and tribunals in the world finds arguments that contest the jurisdiction of the

ICC. It is thus admitted that courts and tribunals are established to realize national courts that cannot resolve interstate disputes but to protect human rights at the international level.

The ICC through rules applicable to its functioning, the norms of international law and the constraints arising from the Statute of Rome consider the theory of delegation as a neutral, objective principle that limits its jurisdiction in many predictable ways, as demonstrated by the arguments relating to the Palestinian situation. In this way, it was subjected the court to various jurisdictional regimes such as to civil and common law systems. The result is chaos.

In fact, the case of Ukraine provides a chaotic jurisdictional nexus since the prosecutor proceeds *ex officio* as in the case of Afghanistan. Only in the case of referral by the Security Council is the jurisdiction of the court clear and the heads of state are immune.

A clear result has to do with the return of an unfortunate precedent that is created by failed attempts to prosecute Kaiser after the First World War. Thus impunity, immunity had prevailed. Positions that are also noted by US during the Rome conference. It was the Security Council that emerged, from cases and situations that were submitted to the ICC (Schabas, 2004; Goodman, 2022),¹⁴⁶ a conception that was rejected by the

¹⁴⁶Schabas affirmed that: “(...) bipartisan consensus has emerged in the United States that the ICC has jurisdiction over Russian nationals (...)”. Press

negotiators in an emotional vote at the end of the diplomatic conference.

This decision was broad and demonstrates the current situation in Ukraine that led the US to indirectly admit its wisdom by not submitting the Court to the Security Council given the veto power of Russia and arguing that the referral of the Ukrainian situation to the ICC was a compelling reality.¹⁴⁷ United States agreed that the ICC has jurisdiction over accused Russian citizens and that it has committed war crimes, crimes against humanity and genocide on the territory of Ukraine.

An opposite position amounts to and admits that American and/or Russian armed forces and intelligence personnel commit atrocious crimes within a country of those that are party to the StICC even if the domestic courts of those states can prosecute such crimes. It is not a precise interpretation of a legal theory that supports the establishment of previous international criminal courts and tribunals such as the StICC.

The dispute regarding the nature of the jurisdiction of the ICC respects international courts. The history of the US with the first slave courts and its own influences have shown that delegation

Release, U.S. Senate Comm. on the Judiciary, Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC's Investigation into Atrocities in Ukraine (24 March 2023).

¹⁴⁷U.N. Secretary-General, Amendments to the Rome Statute of the International Criminal Court, art. 15 bis, U.N. Ref. C.N.651.2010.TREATIES-8 (Depositary Notification) (11 June 2020).

does not accompany discussions regarding the jurisdiction of international courts in the way that the ICC has fought for its position globally despite the problems that exist especially in recent years with the atrocities in Ukraine.

The US portray original positions and widespread ideas, as the idea of a special court for aggressions made against Russia/Ukraine. Also, the immunity of figures such as Vladimir Putin means impunity before the ICC.¹⁴⁸

There was also a draft from the EU that took the same position on the matter.¹⁴⁹ This is an interpretation that has guided Art. 27 StICC (Skander Galant, 2019; Sadat, 2020).

Every international criminal court has faced an issue without exceptions and has rejected that of immunity for heads of state. The delegation theory does not mean that it operates without limits. The ICC is bound by its own statute and its dependence on states.

A good balance has been found between constraints and independence thus placing judgments within international criminal law that articulates other international criminal courts and tribunals. States that have sought amendments to the statute mean that they have sought to correct the jurisprudence

¹⁴⁸Advisory Commission on Public International Law, op. cit., 13-14.

¹⁴⁹Options Paper by the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy on Ensuring Full Accountability of Individuals Responsible for International Crimes in Ukraine (2 December 2022).

believing that the ICC serves to label unlawful behaviors because it needs a universal credibility for an international court that takes a stand for the atrocities committed by putting judges at a limited independence (Trahan, 2020).

The judges are viewed as independent evaluators of their own mandate within the limits imposed by the Rome Statute and the general international law.

If states consider that the ICC has exaggerated, it is possible to limit its jurisdiction. Thus, the statute is asked to include immunities for heads of state and non-party states in order to place limits on the territorial jurisdiction of the court.

After the Kampala Amendments, for crimes of aggression, citizens of non-party states are excluded from the jurisdiction of the ICC, thus showing that states are able to impose limits on the ICC.¹⁵⁰ The jurisprudence of the ICC resolves the issue of the jurisdiction of the court for non-party states based on the relevance of the theories of delegation and immunities before the court.

The Al-Bashir case actually involved an accused head of state that provided for referral to the Security Council, as a referral mechanism that did not change the functioning for the application of the statute, avoiding thus the problem of a double standard. The court did not conceive that such an institution has

¹⁵⁰See art. 15 bis of the Kampala Amendments.

two different faces.

An ICC as an international court exercising its international jurisdiction represents a strong glimmer of hope for future generations to fight serious crimes that are of concern to the international community and that do not go unpunished. It is an argumentative vision of an international order of a normative nature that is based on values, dogmas, defenses for international criminal law as an order that gives importance to human dignity and to human rights.

A fundamental crime is an example of a policy with many cancer cells, of an incurable cancer as a universal threat (Luban, 2004). And it is the states that all put together their jurisdiction to create courts, international tribunals to deal with threats, as in situations in Darfur, Rwanda, Myanmar, Ukraine thus giving the courts the authority to judge individual cases. It is not a delegation on the side of their own powers. In reality the states all together will have to do what one state cannot do alone.

Everyone needs a community that functions according to the principle of solidarity at an international level (Liakopoulos, 2025) thus creating for all parties an exercise of *ius puniendi* of an international community that fights the atrocities, the impunity. Crimes that have been upsetting pure human knowledge for many years, perhaps centuries.

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